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THE ANNUAL CONFERENCE OF JUDGES.

Probably there will be no more interesting and certainly no more important event in connection with the program of the 1920 Convention of the American Bar Associa at St. Louis in August than the annual conference of the Appellate Judges, now officially designated as the Judicial Section. Organized at the Montreal meeting in 1913 the Section is now seven years old. It has held, during that period, some notable meetings. Until this year the program has included addresses by Statesmen, Ambassadors or a member of the Federal Supreme Court. But it transpired that this beneficial and very attractive feature consumed time essential for the important business of the conference, and would have to be sacrificed abiding the granting of more time by the Bar Association for its purposes. Eventually an entire day will be set apart for the Judicial Section.

The time of the conference this year will be wholly consumed by the Judges, as judges, in the discussion of subjects germane to their daily work, in making suggestions of mutual benefit and help and in perfecting American judicature.

A most pleasing event will be the resumption of the informal dinner, which custom will be regularly observed in the future, after having been abandoned for two years. It will be preceded by an equally informal reception at which the Judges will be able to become personally acquainted. The reception will begin at 7 p. m., and the dinner at 7:30, and will keep up during the evening.

The spirit of the meeting will, in all probability, develop into a sort of "judicial gossip over state back fences," where each judge will have opportunity, if he does not feel obliged, to explain to "his learned brother" of another Appellate Court why he was unable to agree with his very able opinion," thereby causing uniformity of decision as well as uniformity of statute to become most probable as well as quite possible. Reasonable, learned and patriotic men like these great jurists know how to sink personal pride of opinion in the interest of the public good. The opportunity has heretofore been lacking.

Anent this thought, the conversation between the members of certain of the U. S. Circuit Courts of Appeals and of certain State Appellate Courts is going to prove interesting. There is much to explain because some of these Courts have formally declared their independence of the obligation to respect prior decisions of State Courts sitting in the same jurisdiction. The National Credit Men's Association wants the conversation to be complete and conclusive. That great business organization will be satisfied with either if 'tother dear opinion were canceled, but it cannot agreeably do business with both.

But, a review of these incidents brings serious thoughts. The business men of this country are preparing to demand of Congress not only a uniformity of decision amongst the several Federal Circuit Courts of Appeals, but as well amongst the Federal and State Courts. The statesmen at Washington are going to follow the course of least resistance wherein arises the likelihood of more conflicting and unscientific statutes in regulation of the conduct of the Courts. The traditional legislative distrust of the judicial department of government will find a vent in a prompt response to the irresistible demand of commerce. Why may not the judges save themselves from this humiliation and the country from this abuse? They will.

It is just such situations as this that the annual conference of judges was intended to correct. Apart from the innate love of law and order, a noble and militant patriotism, an intimate knowledge of human nature and the science of the government

designed to keep it in subjection, the American jurist is a man. He is still in sympathy with the activities of a commercial world from which his sacred calling forced him to retire, and views it with a common sense that places him upon the same plane. The American judge has neither to look "down" nor "up" to see to understand and to sympathize with the endeavors of his fellow countrymen engaged in business, that have made America the richest and most powerful of the nations of the earth.

In this mental attitude of the people lies the strength of the Courts. Judges do not draw their power from the words of statutes and a Constitution, but from the spirit of a citizenship that was conceived in trust and confidence and bred in respect for and submission to the law and its orderly administration. Additional statutes will be but so many more printed pages in the presence of an insurgent people—made dissatisfied through the failure of the judges to agree upon what is the law and to apply it uniformly—certainly in all the Federal Courts if not in both the Federal and State Courts.

To the man in the cloister an illustration may be necessary. Interstate commerce has long since jumped the hurdles of political state boundaries and sells and delivers its wares to the four corners of the American Continent. It almost invariably invokes the aid of the Federal Courts when litigation arises. When informed that, in accordance with the opinions handed down by the several U. S. Circuit Courts of Appeals, the thing he does legally in the First District is contrary to law in the Second or the Ninth, he is confirmed in the opinion that law is not a certain thing, but is the whim of an individual; that this is a country of men and not of government; that each Federal Circuit is a law unto itself. He concludes that there is no standard and that there is no such thing as *malum in se*, that he will fix his own rules of conduct and take a chance at the judicial guess; that, we say, is the attitude of many men.

The judge must put himself into the position of the man of business in order to analyze his mind and spirit and understand violations of the law and lack of respect for the judicial machinery. Napoleon found that the laws of France changed at every change of horses that drew the state coach. Eventually an emperor used a mailed fist to correct the abuse and he did it with the acclaim of an ignorant or an untrained but dissatisfied people. May this meeting of the Judicial Section be one of introspection and of serious and consecrated thought and endeavor. "Justice is the greatest interest of man on earth."

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

PUBLIC USE A STATE QUESTION AND NOT A QUESTION UNDER THE FOURTEENTH AMENDMENT.—The Supreme Court declares in the recent case of Green v. Frazier, 40 Sup. Ct. 490, that the Fourteenth Amendment offers no protection to citizens against socialistic legislation, even if property is taken by taxation for a use usually regarded as private, yet declared by the legislature and the courts of the state to be, under the peculiar situation existing in said state, in fact a public use.

In this case, Green and other taxpayers of North Dakota attempted to enjoin the enforcement of certain so-called socialistic acts of the legislature which were in this case part of the program of the Non-Partisan League, which has risen to political power in the Northwestern states and principally in North Dakota. These acts were: an act creating an industrial commission to control all public utilities with power to fix the buying and selling prices of things regarded as affected with a public interest. Second, the Bank Act, creating the Bank of North Dakota, with branches in every city, and whose deposits shall be guaranteed by the State. This bank is authorized to make loans to the Industrial Commission to assist it in carrying out its business program. Third, an act authorizing a

bond issue to raise capital for the Bank of North Dakota. Fourth, an act authorizing a bond issue to raise ten million dollars to provide a fund out of which loans on real estate could be made. Fifth, an act authorizing the State to engage in the business of manufacturing and marketing farm products and to establish State elevators. Sixth, the Home Building Act, to assist its citizens in buying and building homes.

These acts were attacked in North Dakota as unconstitutional on the ground that by them private property was taken for a private use. The Supreme Court, however, sustained all of the Acts specified on the ground that they served a public use under financial and agrarian conditions existing in North Dakota. This decision, the Supreme Court of the United States declares, is binding on it so far as the Fourteenth Amendment is concerned. The Court said:

"As we have said, the question for us to determine is whether this system of legislation is violative of the Federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved, so far as we have been able to discover, has never been presented to this Court. The nearest approach to it is found in Jones v. City of Portland (245 U. S. 217), in which we held that an act of the State of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessaries to the inhabitants of cities and towns did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment.

"This is not a case of undertaking to aid private institutions by public taxation as was the fact in Citizens' Sav. & Loan Assn. v. Topeka (20 Wall. 665). In many instances States and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise.

"Under the peculiar conditions existing in North Dakota, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision."

The position of the Supreme Court is correct, but the decision must not be understood as approving the definition of the Supreme Court of North Dakota of what is a public use. It must be remembered that before the Fourteenth Amendment the powers of the State to tax its citizens for any purpose was unrestrained by any federal authority. The Fourteenth Amendment does not transfer to one tribunal (the United States Supreme Court) the right to determine the needs of every community by transferring to that tribunal the power to define the term, "public use." That term is left for the States to define. Of course, the Supreme Court would not permit a tax to be imposed for what was clearly and unquestionably a private use. Fallbrook Irrigation District v. Bradley, 164 U. S. 155. But the present decision indicates that in all doubtful cases the Supreme Court will defer to the judgment of the local courts.

THE SUPER-CONSTITUTION.*

When Wm. H. Seward said, "There is a higher law than the Constitution," lovers of that document were astounded at the sacrilege. In the modern development of the branch of constitutional law that I propose to discuss, his utterance is so generally accepted by legislatures and courts, that it furnishes the theme of this article —The Super-Constitution.

The development and growth of the doctrine of the police power is interesting and remarkable; interesting as a study of constitutional law; remarkable as a force destructive of constitutional inhibitions.

When the Constitution of the United States was framed, each of the states was a separate, independent government, and they surrendered a part of their sovereignty to the federal government, but all "powers not delegated to the United States by the Constitution nor prohibited by it to the states" were "reserved to the states respectively, or the people." The power remaining in the states is called by Mr. Hamilton in The Federalist "the residuary sovereignty."

As was to be expected, there soon came a clash between the state and federal governments as to the respective powers of

*This remarkable discussion of the police power by the Chief Justice of the Supreme Court of Florida is a revision of an address delivered by the learned Justice to the law class of the University of Florida, March 16, 1920.

each. There were those who advocated an extension of the granted powers of the federal Constitution, to a degree that would have effaced the states, and left them no residuary sovereignty. It was to preserve this residuary sovereignty, that Mr. Chief Justice Marshall applied the doctrine that has come to be known in constitutional law as the Police Power.

In 1824 we find expressions suggestive of this power, but it yet had not been given a definite name. Thus in Gibbons v. Ogden, Mr. Chief Justice Marshall, speaking of the commerce clause of the Constitution, says, it "implies no claim of a direct power to regulate the purely internal commerce in the state, or to act directly on its system of police," and farther on he speaks of the states' "purely internal affairs whether of trading or police."

It is not until 1827 that this Frankenstein's man was christened, and we find the name used for the first time in American jurisprudence, by Mr. Chief Justice Marshall in Brown v. Maryland, where he says: "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain with the states." We find no use of the term, police power, again until 1837, in the case of New York v. Miln,[1] and there Justices Barbour and Thompson both use it. But even in that case the term as used by them was rather an adoption from Mr. Marshall than a recognition of it as a distinct doctrine. When discussing the reserved power of the states, both Justice Barbour and Justice Thompson speak of the "power of state to regulate its police," "internal police of the state," "power to regulate internal police" and other terms of similar import, and the final decision was that "the act was not a regulation of commerce, but of police."

As late as its thirteenth edition in 1867, no mention of police power is made in Bouvier's Law Dictionary, nor did the United States Digest in its original edition or its revision in 1873 include the phrase among its separate headings or among its subdivisions of constitutional law.

The doctrine in its origin was never intended to be carried to the extreme it has now reached. It originated in a struggle between the two sovereignties (if there can exist such a condition); that of the states and of the federal government, and in its origin and earlier application,—in fact if not in its entire earlier application by the federal courts—was intended as a restraint upon federal authority from encroaching on the power of the states, by recognizing and enforcing the reserved sovereignty of the states.

The purpose and effect of those earlier decisions where the doctrine of the police power was proclaimed and amplified, was definitely to fix the status of the states in the union as sovereigns, as to all matters not relinquished by them to the federal government, and not limited by state constitutions.

There were certain powers necessary for the states in the exercise of the functions for which they existed, that could not be taken away from them by the federal government, in the exercise of its powers. But in recognizing, declaring and definitely fixing this sovereignty in the states, it was not intended to establish a doctrine that the states were sovereign to the degree that the legislative power or the powers reserved to the people could not be restrained by state constitutions.

The police power, the uncontrolled power of sovereignty, is the power of absolutism,—of despotism. It was a power well known to the framers of our government (but not by the name of "police power") as inherent in absolute monarchs, which they exercised untrammeled and uncontrolled by any restraints whatsoever. The most despotic and tyrannical acts of kings,—the greatest cruelty practiced upon

(1) 11 Pet. 102.

their subjects,—were done under the guise of the welfare of the state, and for the good, the health, the quiet, comfort and prosperity of their people, and there existed no power to limit or restrain the exercise of this power.

In the Banquo's Ghost case of Munn v. Illinois,[2] Mr. Chief Justice Waite illustrated his discussion of the police power by reference to the right of the King to control the use of the banks of a stream, and said, "This privilege or prerogative of the King, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare."

It was to check and limit the absolutism of sovereignty, it mattered not by whom exercised, that the framers of our state constitutions placed in them certain guarantees. The limitations upon his power that the Barons forced King John to accept, our forefathers voluntarily placed upon themselves in the exercise of their legislative power. Upon this subject, Chief Justice Marshall says:

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. * * * To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that *the constitution controls any legislative act repugnant to it;* or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. *The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.*"

Passing now from the original and earlier development of the doctrine of the police power in the federal courts, I come to its adoption and development in the state courts, and its later extension by the federal courts. Its application and growth was at first slower in the state than in the federal courts. It is true that controversies arose that involved this question, but we do not find the use of the term which today, in effect, enthrones absolutism either in the legislature or in the proletariat, until used by Judge Lymann Trumbull in 1852 in Jones v. The People.[3] It is most unfortunate that this was a liquor prohibition case. Not the least of the evils that the traffic in liquor has produced, is the line of decisions sustaining laws destructive of property and property rights, and pointing the way to further destruction and confiscation of other classes of property.

The case of Commonwealth v. Alger,[4] used and illustrated the doctrine of police power as applied to legislative authority to interfere with property rights, and although Mr. Justice Shaw in this case, and Justice Trumbull, like all the earlier judges who applied this doctrine, limited the power to reasonable restraints, their burdens, limitations, regulations, etc., on property, their decisions have become authority for the total destruction of property rights and the

(2) 94 U. S. 113.

(3) 14 Ill. 196.

(4) 1851, 7 Cush 53.

confiscation of property under the guise of the exercise of the police power.

Justice Shaw in 1846 in Commonwealth v. Tewksbury[5] discussed the power of the legislature to make reasonable rules and regulations restraining and limiting the use of one's own property. He did not in terms call it the police power, but it was a discussion of what is now so denominated. In that case he placed it upon the only sound and safe basis, the maxim *Sic utere tuo ut alienum non laedas,* a liberal translation of which is, "So use your own property as not to injure others," and although in Commonwealth v. Alger, he uses the term police power, he again applies this maxim. He says:

"We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." * * * "The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

And after referring to instances where the power to restrain or regulate the use of property may be rightfully exercised, he says:

"But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas.* It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner."

(5) 11 Met. 55.

Prior to the decision in Munn v. Illinois, the courts generally adopted this maxim as the basis of the police power. "The police power of the state," says the Supreme Court of Vermont, "extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the state. According to the maxim, *Sic utere tuo ut alienum non laedas,* which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."[6]

In Atlantic Coast Line Ry., Goldsboro,[7] Mr. Justice Pitney said:

"Under such circumstances the state, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim, *Sic utere tuo ut alienum non laedas,* so far as may be requisite for the protection of the public."

But no sooner had he drawn this picture of the only sound basis of the doctrine of the police power, than he dipped his brush in the blackest ink and blotted it out by this radical declaration:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."[8]

Finally, we have the decision in Union Dry Goods Company v. Georgia Pub. Service Corporation,[9] where Mr. Justice Clarke, after citing authorities, said:

"These decisions, a few from the many of like effect should suffice to satisfy the most

(6) Thorpe v. R. R. Co., 27 Vt., 149.
(7) 232 U. S. 548.
(8) A. C. L. Ry. Co. v. Goldsboro 232 U. S., P. 726.
(9) 248 U. S. 372.

skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."

That this is now the law, we can only deplore but not dispute, but may we not hope for a renaissance of respect for the Constitution that will afford greater protection to rights of property and of contract? As long as the exercise of the police power was restrained by constitutional limitations, and legislation upheld only when its purpose was clearly, unequivocally and directly to protect the public (not the private) health, safety and morals it worked no special harm, but in view of the modern tendency of the courts we can see that it was always a torpedo under the ark.

It is interesting to note how some courts have jealously guarded constitutional guarantees, and restrained the application of the doctrine of the police power, unless it clearly appeared that the legislation was not limited by the Constitution, and had a direct and not an incidental effect upon the health, safety, and morals; while other courts gave their sanction to laws that only by the most involved reasoning could be construed to have any bearing upon the health, safety or morals of the public, and enlarged the doctrine so as to include public happiness, welfare, convenience, prosperity and quiet. It is difficult to conceive of any legislation restrictive of personal liberty and private rights of property, and the rights of contract, that cannot be brought under one or more of these purposes over which the courts say the police power is supreme; greater than the Constitution.

Add to this the doctrine, that the right to regulate, restrict or restrain certain uses of property carries with it the right to pro- courts have done, the doctrine of *sic utere tuo*, as the basis of the police power and the Constitution becomes a mere scrap of paper, and we have an absolute, instead of a constitutional government. Then apply the doctrine of Noble State Bank v. Haskell[10]—which I shall have occasion to revert to hereafter—that whatever is "sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion" may be written into law under the doctrine of the police power, and we have the dictatorship of the proletariat.

When I recall the overwhelming tidal wave of indignation that swept over this country when the German Emperor called the Belgian Neutrality Treaty a "scrap of paper," I marvel at our indifference at court decisions, that make scraps of paper of our constitutions. How much dearer to the ears of Constitution lovers is this pronouncement from the Supreme Court of Kentucky, in Commonwealth v. Smith:[11]

"The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weakness which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the question. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Court so to adjudge, and thereby give effect to the Constitution."

I have contented myself with referring to those cases, state and federal, where the doctrine of the police power first appeared, and those that have enthroned it as a Superconstitution, for it would be impossible to review even cursorily the almost limitless

(10) 219 U. S. 104.
(11) 163, Ky. 227.

number and classes of cases where this question is discussed, and legislative enactments effecting the rights of persons and property considered, and sustained or disapproved. Such an examination, however, will show that there has been a steady, and of late, a rapid extension of the doctrine of the police power, and that slight encroachments upon constitutional rights sustained frequently by a divided court, have been used as authority for still further encroachments until it has reached the point of being a present menace to orderly constitutional government, and sanctions its utter effacement.

A distinguished writer on this subject thus tersely describes its growth:

"Chief Justice Marshall dropped the seed without intending it. Justice Barbour picked it up without observing it, and until it has grown almost to its full size no one remarked it as anything peculiar."

Since then, this thing that had no name until 1827, but existed in the Eastern hemisphere as a prerogative of despotism, has been enthroned in our jurisprudence as something greater than a written Constitution, something more sacred than liberty, something dearer than rights of property, something more powerful than the obligations of a contract, but more dangerous than the wildest nightmare of German invasion or the ranting of the Reds whom we are deporting; a veritable Super-constitution.

It is unfortunate that in a large percentage of the cases where encroachments of the police power upon the Constitution have been sustained, political sentiment was strongly enlisted in behalf of the laws; laws which because in the main they were good, and had a laudable and high moral purpose, public sentiment approved of the destruction of constitutional guarantees in order to sustain them. In most of the decisions where the tendency has been to nibble away constitutional rights, there has been a studied effort to try and bring them within constitutional limitations, and disclaim that public sentiment, public clamor, passion or prejudice had any influence on the court, or that it was responsive to public sentiment. There are two decisions, however, that meet each of these pretenses squarely; one declaring that the police power is above the Constitution, and the other that public sentiment, passion or prejudice is the controlling factor in determining whether or not an act is within the police power of the state.

In the case of Barbour v. State,[12] the Supreme Court laid down this doctrine:

"But neither ownership, nor property rights, nor possession will be permitted to hinder the operation of laws enacted for the public welfare. Man possesses no right under the laws or Constitution, state or federal, which is not subservient to the public welfare."

Here we have a fearless declaration that the exercise of the police power by the state cannot be restrained by constitutional limitations. I condemn the doctrine of this case, but admire the courage of the writer of that opinion for unqualifiedly proclaiming the doctrine of a Super-constitution, a doctrine that other courts sanction, but refuse to proclaim. That decision has been cited approvingly by nearly every court, including our own Supreme Court, in support of statutes that have been attacked on the ground that they improperly and unreasonably abridged constitutional rights. and to give sanction to laws enacted under strong popular demand, upon the doctrine that constitutional guarantees afford no protection from legislative encroachments, purporting to be for the public good.

The framers of our Constitution were students of history and government, and were not ignorant or unmindful of this doctrine. They knew that absolute power over life, liberty and property would become despotic and tyrannical, it mattered not whether lodged in a king, in a legis-

(12) 146 Ga. 667.

lature, or in the people directly. They had done away with kingly rule;—was it possible that they intended to invest the legislature with kingly power? On the contrary, the people who established the state governments intended to curb, control and restrain the legislative will by certain constitutional limitations.

The decision in the Georgia case destroys constitutional guarantees, and makes the police power a Super-constitution. A short time before the Georgia Supreme Court enunciated its doctrine, the Supreme Court of the United States in Noble State Bank v. Haskell, had placed a different king upon the throne,—public sentiment. The doctrine of that case makes state constitutions the shuttlecocks of public opinion, and substitutes for a government of laws, a government by public clamor. Mr. Justice Holmes, who delivered the unanimous opinion of the court, said:

"It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, *or held by the prevailing morality or strong and proponderant opinion* to be greatly and immediately necessary to the public welfare."

Aristotle classes civilized governments under three heads, Royalty, Aristocracy and Constitutional Government. Each may partake of some of the attributes of the others, but retain its general character. We condemn royalty, but permit the President of the United States to exercise powers far beyond any that the King of England exercises or would dare to assume. We sneer at an aristocracy, forgetful or unknowing that its very name, Aristos—Kratein, "the best, to govern" is the ideal which we should devoutly desire for the United States. A government by the best! Is there any good citizen who would not have all offices filled by the best? It is palpable that it is not these forms of government that we condemn, but their corruptions—the evils that may grow out of Royalty, Aristocracy and Constitutional Government. Aristotle thus points them out:

"Of the above-mentioned forms, the perversions are as follows: of royalty, tyranny; of aristocracy, oligarchy; of constitutional government, democracy. For tyranny is a kind of monarchy which has in view the interest of the wealthy; democracy, of the needy; one of them the common good of all." Continuing, he says: "There is doubt as to what is to be the supreme power in the state. Is it the multitude? Or the good? Or the one best man? Or a tyrant? Any of these alternatives seems to involve disagreeable consequences. If the poor, for example, because they are more in number, divide among themselves the property of the rich—is not this unjust? No, by heaven (will be the reply), for the lawful authority (i. e., the people) willed it. But if this is not injustice, pray what is?"

We now begin to see wherein comes Russia's claim to be a pure democracy. Her government is that of the multitude, and she has taken private property, and particularly land, from its former owners, and is holding and administering it for what she contends is the good of the many, —the public welfare.

If Lenine and Trotsky were asked why they abolished the "right to privately own land within the boundaries of the Russian Republic," and "confiscated without compensation for the loss incurred all land, mines, forests and waters," they would reply that it was "for the general welfare, happiness, comfort and prosperity of the people;" that the "public safety and public morals required it; that private ownership in these properties caused wealth to be accumulated in the hands of the few, and the many reduced to poverty, suffering and crime; that when poverty is widespread, men will steal to get what they cannot otherwise acquire, and women will sell their virtue to get the necessities of life and to feed their starving children." They point to the condition of the masses in Russia under the Romanoff dynasty, and say

that "private ownership in these properties is inimical to the public welfare; producing idleness, pauperism, suffering and crime," and consequently the right of property in them "is declared not to exist in any person, association of persons or corporations." This doctrine sounds strangely familiar. Perhaps Trotsky, when living in the United States, read some of our legislative enactments and the decisions of our courts sustaining them under the doctrine of our Super-constitution, and was inspired thereby to embody them in the Russian law.

We are advised that the war has caused a social revolution out of which will come a government based on the claims of labor. There can be no doubt that there exists in this country a strong and growing public sentiment that is restive under constitutional restraints and restrictions, that would have the courts adopt a latitudinarian construction to enable the people to enact into law any new and untried doctrine that fancy may suggest or prejudice demand. That we are in great danger, the authorities in Washington fully realize. The danger that they are trying to avert is the extension to this country of the Marxian doctrine as applied in Russia, where life, liberty and property are being ruthlessly destroyed on the altar of that doctrine.

When these doctrines are sanctioned by the "prevailing morality" or advocated by a "strong and proponderant opinion," laws enacted to put them in force in this country will be sustained as a proper exercise of the police power.

That I am not unduly alarmed at the growth and prevalence of these views is seen from the drastic means being used by the federal government to get rid of those who openly teach them.

I quote now from another source, to show that the views of Trotsky are not confined to him, and that we do not accomplish much when we direct all our efforts to checking what we *call* Bolshevism, but which we seem to fear to *define*. A great leader of those forces that are now seeking to control all governments says:

"We realize further that there can be no true freedom so long as property and power are concentrated in the hands of a few, and the *democratic* watchword for the struggle of the future is 'Through Equality to Freedom.'"

Again, "It would be idle, however, to deny that the temper of *democracy* after the war will not be so placable as it has hitherto been. Whether we like it or fear it, we have to recognize that in the course of the last three and a half years people have become habituated to thoughts of violence."

"We believe that the path to the democratic control of industry lies in the common ownership of the means of production; and we shall strenuously resist every proposal to hand back to private capitalists the great industries and services that have come under government control during the war."

"The outstanding fact of world politics at the present time * * * is that a great tide of revolutionary feeling is rising in every country. Everywhere the peoples are becoming conscious of power."

Again, "When the leaders of democracy speak of Revolution—" "they intend simply to warn the dominant classes that any attempt to keep *democracy fettered* and *subordinate* is foredoomed to failure. By peaceable methods or by direct assault, society is going to be brought under *democratic* control."

This is no Russian Bolshevist speaking; it is Mr. Arthur Henderson, former member of the British Parliament, and of the British Coalition Cabinet, and Secretary of the English Labor Party, in his word, "The Aims of Labor."

I have quoted so extensively from this great labor leader, neither to endorse nor to combat his views, but to illustrate what I am trying to make clear, that there is a great movement on foot, aggressive and insistent, for a readjustment of American ideals of the sacredness of property and our standards of justice and equality. The

American idea of equality, is equality before the law, and must be for all alike; that legislation in favor of a class is as obnoxious as legislation against a class, and that all classes and all persons shall stand alike before the law, and there must be no special law for a particular person or a particular class. But these ideals may give way to newer ones, and other property may by law be declared not to be the subject of private ownership, and may be entirely destroyed, or confiscated to the state. Property in large manufacturing plants, or in transportation companies may be taken from the present owners and held by the state for the common good, or taken away in part, by giving to others than the present owners an interest and share in its management and earnings.

This sounds like a strange doctrine to lovers of constitutional government, but strange as it may sound, whenever the "prevailing morality" or a "strong and preponderant public opinion" demands this radical destruction of property rights, it will be justified, sanctioned and sustained by the Super-constitution that the courts have created, nurtured and deified.

The framers of our government knew that there was but one way to protect personal liberty and property from such movements, and that was to place them within the protection of written constitutions so that no law could be passed in time of great public passion, prejudice, or emotion to impair them.

Hear the words of wisdom of Chief Justice Marshall:

"Whatever respect might have been felt for the state sovereignty, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield *themselves and their property* from the effect of those sudden and strong passions to which men are exposed."

One of the early decisions of the Supreme Court of the United States thus expressed its disapproval of the doctrine that whatever is demanded by the people may be written in the law, uncontrolled by constitutional inhibition:

"It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the *most democratic depository of power*, is, after all, but a *despotism*. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all on which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."[13]

This country is in no danger from a revolution of force. No one fears or should fear the rantings of long-whiskered Russians or other foreigners against our government. The voice of every *Red* within our gates, raised in one loud acclaim against constitutional guarantees will be ineffectual to destroy them; while the doctrine of Mr. Justice Holmes in Noble State Bank v. Haskell, and the Georgia court in Barbour v. State, will blow away like chaff before the wind, all constitutional protection of life, liberty and property.

The time is not far distant when the radicals will see that it is not necessary to advocate the nullification of our Constitution, but that they need only to get control of legislatures and congress, and they may then write in the law the destruction of all rights of persons and property, and wipe out all contracts, and when the Constitu-

(13) Loan Assn. Topeka, 20 Wall. (U. S.) 655, 22L. Ed. 455.

tion is invoked to restrain them, they will have as their champion, the apotheosized Police Power, at whose feet all constitutional guarantees must humbly kneel petitioning observance, but impotent to demand it. They may then shout, "The Constitution is dead—Long live the Super-constitution!"

We come now to the war decisions, where the claim of a federal police power is first advanced by Mr. Justice Brandeis. In the case of Hamilton v. Kentucky Distilleries and Warehouse Co., decided December 15, 1919, Mr. Justice Brandeis said:

"But is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the state of its police power, or that it may tend to accomplish a similar purpose. The Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. If the nature and conditions of a restriction upon the use or disposition of property is such that a state could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

In marked contrast to this radical,—I almost said *Red*, doctrine, is the judicial utterance of Mr. Justice Bradley in the Legal Tender Cases:[14]

"A constitutional government, notwithstanding the right of eminent domain, can not take physical and forcible possession of all that it may need to defend the country, and is reluctant to exercise such a power when it can be avoided. *It must purchase,* and by purchase command materials and supplies, products of manufacture, labor, service of every kind. The government cannot, by physical power, compel the workshops to turn out millions of dollars' worth of manufactures in leather, and cloth, and wood, and iron, which are the very first conditions of military equipment. It must stimulate and set in motion the industry of the country. In other words, it must *purchase.*"

The opinion of Mr. Justice Brandeis that I have quoted from seems to limit the exercise of police power by the federal government to periods when the United States is at war, but a careful analysis will disclose that it is not so limited.

The authority for the federal government to exercise police power, as claimed in this decision is predicated upon the power granted to congress by the Constitution, "To declare war," and from Sec. 8, Art. 1:

"To make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department of officers thereof."

The claim for such unlimited power was first put forth in the draft cases.[15] It was then held that congress, under the authority of Sec. 8, Art. 1, could pass any law conducive to the successful termination of the war. Under this authority laws regulating eating, drinking, moving from place to place, use of fuel, and what-not, were sustained; but as this clause of the Constitution embraces not only the power to pass laws to carry into effect the power "to declare war," but every other power granted by the Constitution, it is manifest that this and subsequent decisions in effect sustain the power of congress to enact any law necessary, expedient, or desirable to carry into execution any of the powers of the government.

Following the draft cases, and the Hamilton v. Kentucky Distilleries and Warehouse Company case, came the decision in Ruppert v. Caffey et al., decided January

(14) 12 Wall.

(15) Arver v. United States 245 U. S. 366.

5, 1920. In the opinion of the majority of the court Mr. Justice Brandeis said:

"The police power of a state over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intixocating liquors. Likewise, the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale. Furthermore, as stated in Hamilton v. Kentucky Distilleries and Warehouse Company, supra, while discussing the implied power to prohibit the sale of intoxicating liquors: 'When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend an exercise by a state of its police power.' * * * The incidents attending the exercise by Congress of the war power to prohibit the liquor traffic are the same as those that attend the states' prohibition under the police power."

The distinction, if any, between this statement, and an open and avowed assertion of police power in the federal government, is a mere matter of words. From Chief Justice Marshall down to 1917, the power was but another name for the "reserved sovereignty" of the states, that could not be exercised by the federal government without destroying that reserved sovereignty.

I can do no better than close with the words of Mr. Justice McReynolds in his dissenting opinion in the wartime prohibition cases in which Mr. Justice Day and Mr. Justice Van Devanter joined:

"The Constitution should be interpreted in view of the spirit which pervades it and always with a steadfast purpose to give complete effect to every part according to the true intendment—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore—'Nor shall any person * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.'"

May the God of the fathers of our Constitution "be with us yet, lest we forget—lest we forget."

JEFFERSON B. BROWNE.

Tallahassee, Fla.

GIFT—CHECK TO DONEE.

EDWARDS v. GUARANTY TRUST & SAVINGS BANK.

District Court of Appeal, Second District, Division 2, California. April 12, 1920. Hearing Denied by Supreme Court, June 10, 1920.

190 Pac. 57.

There was no valid gift where the donor's check, given to the payee as a gift, and presented to the drawee bank prior to drawer's death, was not accepted or paid before such death, although payment was rejected without any malicious or wrongful intent, for a reason later shown to be incorrect.

THOMAS, J. This is an action brought by plaintiff against defendant as executor of the estate of Benjamin Lezer Liveson, deceased, on a "rejected claim," evidenced by a check given to plaintiff by the deceased on February 28, 1916, in the sum of $4,000, and intended as a gift to plaintiff.

From the record it appears that on March 2, 1916, the plaintiff deposited the check in question with the National Bank of Long Beach for collection; that on March 3, 1916, the check was presented to the bank on which it was drawn, and in which it is conceded the deceased had on deposit a sum approximating $9,000, and by said bank payment thereof refused, the check being returned marked "signature incorrect;" and that on March 4, 1916, Liveson, the drawer, died.

The case was tried to the court without a jury, and findings and judgment were in favor of the plaintiff as prayed for. The appeal is from the judgment so entered, on the judgment roll alone. There is just one point,

and that one of law, in this case. The question with which we are here confronted is: Can a check, given to the payee as a gift, and presented to the drawee prior to the death of the drawer, and not accepted or paid, but payment of which was rejected for any or no reason, constitute a valid gift inter vivos or a gift causa mortis?

So far as material here, the Court found as follows:: That the deceased executed and delivered the said check as already stated; that at the time of the execution thereof deceased had a sum in excess of $8,000 in the drawee bank, known as a "term account;" that the bank book evidencing such account, in the possession of deceased at and prior to the time of his death, showed "that the bank reserved the right to require on term deposits six months' notice of intention to withdraw;" that said bank refused to pay said check, giving as the sole and only reason for such refusal the fact that the signature of said Liveson on said check was "incorrect;" that said bank waived the provisions requiring six months' notice of intention to withdraw from the funds of the said Benjamin Lezer Liveson, and waived the presentation of the passbook; that the refusal to pay said check was not caused by any malicious intent of the defendant; and that said signature on said check was not incorrect.

As already intimated, the proposition which confronts us on this appeal is whether, under the record here, the intended gift to plaintiff had become complete before the drawer's death, or whether it was merely inchoate. If the transactions between them constituted a completed gift, the money represented by the check—it being conceded here that the drawer had sufficient funds to his credit in the bank to meet the check—belonged to the plaintiff, and, under the facts found, and under this assumed state of facts, it became and was the legal duty of the bank, with respect to the drawer of the check, at least, to honor the same when so presented, although even if, for our present purpose, it be conceded that there was no liability on the part of the bank to the holder of the check. On the other hand, if the gift had not been perfected, but was incomplete at the time of the drawer's death, the money in the bank belonged to the estate of decedent, and descended to his heirs. Under this latter assumption the plaintiff cannot recover.

Counsel for respondent in his brief says:

"We do not know of any case in the United States, and we have looked carefully, where the point involved in the case at bar has been decided."

We, too, have looked, and have, we think, found much law in opposition to the position taken by respondent here. In the case of Provident, etc., v. Sisters, etc., 87 N. J. Eq. 424, 100 Atl. 894, the Court of Chancery of New Jersey had before it a case in its material aspects very similar to the case at bar. Mrs. Bowdoin, an old lady, 86 years of age, had died in the hospital. The day before her death she gave a check to the defendant in that case for $3,000. On the same day the check was given it was presented at the bank upon which it was drawn, and payment was refused, not absolutely, but until investigation could be made. The old lady died the next day, and before any further efforts to collect the check were made. The Court in that case—which is a well-considered case, and very illuminating and instructive—among other things said:

"It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit when the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor. Where a check on a bank of deposit is given for value, it often operates as an equitable assignment, but such is not the case where a check is given to the payee as a pure donation. * * * It cannot be questioned in this case that, if Mrs. Bowdoin had given a check on an ordinary bank of deposit, no gift would have been effected until the check had been cashed. Nor does it make any difference what may delay or prevent the check from being cashed."

We are in full accord with this reasoning and the conclusions reached. See notes L. R. A. 1918C, 340; Foxworthy v. Adams (Ky.), 27 L. R. A. (N. S.) 308; Estate of Taylor (Pa.), 18 L. R. A. 855. Until the money was actually paid over or transferred from Liveson's account to that of the plaintiff by the drawee bank, the gift, whether it be regarded as inter vivos or causa mortis, would be revocable, and after the death of Liveson the whole transaction would have stood legally as an incomplete gift, entirely unenforceable at law or in equity. Provident, etc., v. Sisters, etc., supra. "To constitute a valid gift inter vivos,

the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive or symbolical delivery, without power of revocation." 20 Cyc. 1193. In order to accomplish this, "there must be a parting by the donor with all present and future legal power and dominion over the property." 20 Cyc. 1196; Tracy v. Alvord, 118 Cal. 654, 50 Pac. 757; Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Simmons v. Savings Society, 31 Ohio, 457, 27 Am. Rep. 521. That the law of this state is as stated in the Provident Case, supra, will be seen by a perusal of that and the other cases cited therein, citing and quoting from the California cases at length.

As the result, therefore, of our own independent search, we are confident that "the great weight of authority supports the proposition that one cannot make his own check * * * the subject of a gift, so that, in the absence of payment, it can be enforced against the donor or his representatives." Foxworthy v. Adams, supra, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308 and note thereunder.

It may be conceded that the record here discloses sufficient facts so that we may infer that it was really the intention of the deceased to make a gift of the money on deposit in the bank, to the extent of $4,000 to plaintiff. Still, as was said in the case of Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001, "however much we may desire to carry out the intentions of deceased, we cannot do so in this case, because the effect would be to hold valid an oral testamentary disposition of her property," which, under the authorities, as we have seen, cannot legally be done.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

NOTE.—*Check Refused Payment in Donor's Life Time.*—The excerpt from Provident, Etc., v. Sisters, 87 N. J. Eq. 424, 100 Atl. 894, wherein it is said: "Nor does it make any difference what may delay or prevent the check from being cashed," is a general statement which must be deemed *obiter dictum* except as it is strictly applicable to the facts before the Court. In the instant case it seems to be true that the drawee bank had no right to refuse to pay the check when it was presented and, therefore, it held the amount for which the check was drawn as the property of the drawee.

The drawee was at the moment vested with a right of action against the bank. How could that be displaced by the subsequent death of the drawer? Suppose he had lived a month or a year instead of two days?

In Westberg v. Chicago Lumber, Etc., Co., 117 Wis. 589, 94 N. W. 572, it is laid down that not immediately, but after a reasonable time for investigation, a bank may decline to pay, but when that time has expired its retention of a bill drawn on it is equivalent to acceptance. In the instant case the bank gave an answer that signature was incorrect and claimant made proof that it was correct. Now shall it be said that the bank's answer was made to give it opportunity for investigation? It does not appear that this is true.

But the bank was bound to honor immediately the true signature of the depositor, where it waived presentation of the pass-book.

If there were any agreement by the holder that the bank could retain the check for investigation, this would amount to a failure presently to demand, as is pointed out in Williams v. Gallyon, 107 Ala. 439, 18 So. 162.

And so, if there is in the conduct of the bank an inference of acceptance, as in Colorado Nat. Bank v. Boottcher, 5 Colo. 185, 40 Am. Rep. 142, this would satisfy to bind the bank to drawee.

Take the case of Pickle v. Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. R. 900, and there, conduct in retention was held equivalent to acceptance, though payment was afterwards made to an unauthorized person. See also Lockhart v. Mass., 53 Mo. App. 633; Hough v. Loring, 24 Pick. 254.

In Bromley v. Brunton, L. R. 6 Eq. 275, it was distinctly ruled that where a check, given as a gift, was promptly presented, but payment refused because donor's signature was doubted, the subsequent death of donor did not prevent the check being a complete gift. And some cases have held that a check intended as a gift is to be regarded as an assignment of the fund for which it is drawn. Thus see Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 8 L. R. A. (N. S.) 828, 117 Am. St. Rep. 694, 10 A. & E. Ann. Cas. 473; Taylor's Estate, 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855; Phinney v. State, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119; Kimball v. Leland, 110 Mass. 325.

In the above last cited case a depositor gave to donee her passbook, but it was not presented until after donor's death. The gift was held complete.

In Provident, Etc., v. Sisters *supra*, there is much discussion and learned disquisition on the old rules of the common law on the ancient law of gifts, but when the completeness of gift is denied by the act or conduct of a third party, or its effectuation conceded by waiver merely of his own privileges, it seems to me that the entire argument is faulty. If a donee does what he can to make the gift complete, no third party's act should make it ineffectual. C.

BOOK REVIEW.

HOLMES FEDERAL INCOME TAX.

The Federal income tax has raised a host of questions, legal and mathematical, to confuse the busy lawyer. Many books have been written to aid the lawyer in preparing his client's return or in presenting his client's case for an abatement or refund of the tax assessment. The most complete work, however, on the Federal Income Tax which we have had the opportunity to review is that by George E. Holmes, of the New York bar. It covers the whole range of direct Federal taxation, including the War Profits and Excess Profits Taxes and also a discussion of the Stamp Tax. The Capital Stock Tax and the Tax on Employment of Child Labor.

The author writes as a lawyer and an accountant, and his advice is clear and competent on both features of the work of making out an income tax return. From the legal point of view the author fully discusses the constitionality of the present law and particular provisions thereof. He also sets forth the provisions of the Act itself and interprets them in the light of decisions construing former income tax and stamp tax laws now superseded. This enables the reader to get a better idea of the meaning of the present law and its historical antecedents and development. The reader, therefore, gets the legal viewpoint in approaching a construction of the income tax, which is broader and more accurate than the angle at which an accountant must approach a consideration of the act. For that reason a lawyer who has also a working knowledge of bookkeeping is a better adviser in preparing an income tax return than an expert accountant with only a slight knowledge of law.

The chief benefit attaching to a book like that prepared by Mr. Holmes, which no income tax service can give is, aside from the legal point of view from which it approaches all questions, the continuity and harmony of the discussion and the clear definitions of all terms used in the act. There is hardly a term used in the act which the author has not discussed in minutest detail, giving authority for his construction where there is authority, or giving his own opinion in the absence of court or Treasury Department ruling.

Printed in one volume of 1,151 pages and published by Bobbs Merrill Co., Indianapolis, Ind.

HUMOR OF THE LAW.

"A whole lot o' talk dat goes 'round," said Uncle Eben, "ain't no mo' real help movin' forward dan de squeak in an axle."—*Washington Star.*

Gypsy Smith, the evangelist, said on his recent voyage from Liverpool: "There are some men who can make a success even of failure. Thus there was a certain peer once who rose to make his maiden speech—a speech granting to all accused persons the right of counsel—and when he put his hand in his pocket for his notes they weren't there. The peer gulped. He looked about him wildly. Gulped again. Then he said: 'If I, my lords, who now rise only to give my opinion on this bill—if I am so confounded that I am unable to express what I had in mind, what must be the condition of that man who, without any assistance, has got to plead for his life?' Then the peer sat down to the cheers of a converted chamber, and his bill passed almost unanimously."—*Argonaut.*

Gov. Morrow recently told some interesting stories of the mountaineers in his state:

"I suppose you demand a feud story. Of course, there are no longer feuds in Kentucky and that feud thing was pretty much overdone by romancing beyond the borders of Kentucky. However, here is a feud story. I cannot vouch for it as I can the others, but this is it:

"'Lige Parsons dropped into the courthouse one day and went to see his friend, the Probate Judge.

"'Howdy, Lige.'

"'Howdy, Judge.'

"'What's doing down Possum Trot, Lige?'

"'Nuthin' worth dividin' Judge, nuthin' wuth dividin'.'

"There was no conversation for a few minutes, when Lige began:

"'Tother evening, I was a-settin' a-reading of my Bible, Judge, when shootin' began. One of the gals said 'twuz the Persons boys down by the fence.

"'Now, Judge, I didn't mind them Persons boys shootin', but I thought they might kill a calf critter or two or maybe hit the ol' woman, so I picked up my rifle and drapped a few shots down thar by the fence and went back a-reading' of my Bible.

"'Next mornin', Judge, I went down by the fence, an' they was all gone, 'cept four.'"—*Post-Dispatch.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Prescription.—Possession alone, no matter how exclusive and complete, is not sufficient to create a title by prescription unless adverse.—Dobbins v. Economic Gas Co., Cal., 189 Pac. 1073.

2. **Alteration of Instruments**—Interlineation.—An interlineation or alteration in an instrument does not of itself raise any presumption of law as to the validity of the instrument, but the question as to when, by whom, and with what intent it was made is one of fact.—Wagoner et al. v. Clark, Ill., 127 N. E. 436.

3. **Attorney and Client**—Undue Influence.—There is a presumption of undue influence where confidential relations exist, such as that of attorney and client, guardian and ward, etc., between the parties to a gift inter vivos, but not in the case of a testamentary gift.—Brotherhood of Railroad Trainmen v. Van Etten, N. J., 110 Atl. 121.

4. **Bankruptcy**—Jurisdiction.—Official responsibility of a trustee in bankruptcy must be enforced in court having jurisdiction of his official account.—School District of City of Carbondale v. Hourigan, Pa., 110 Atl. 173.

5. **Banks and Banking**—Clearing House.—Where rules of clearing house permitted a member to clear for a non-member, but required non-member's consent to be governed by its rules and regulations, such rules and regulations were a part of the contract between non-member and member clearing for it, and such contract should be construed in the light of such rules.—Moore, State Bank Examiner, v. American Savings Bank & Trust, Wash., 189 Pac. 1010.

6.——Assignment of Assets.—An assignment by a bank of all of its assets of every kind, character, and description, wheresoever situated, will transfer to the assignee therein the liability of the directors to such assignor bank for misapplication or misappropriation of its funds due to mismanagement or misconduct.—First Nat'l Bk. of Fairmont et al. v. Smith et al., W. Va., 103 S. E. 318.

7. **Bills and Notes**—Consideration.—Where shortly after the death of a county treasurer it was discovered he had misappropriated county funds, and the widow, father, and brothers of the treasurer at instance of the commissioners executed a note for the amount of the defalcation, payable in 90 days, the implied extension, accompanied by actual forbearance to proceed against the estate of the treasurer, was a detriment to the promisee, or, in the language of Rev. Code 1919, § 840, a prejudice suffered, which was a sufficient consideration to sustain the note as the county might otherwise have immediately proceeded against the treasurer's estate.—Western Surety Co. v. Walter et al., S. D., 179 N. W. 804.

8.——Mortgage.—Though a negotiable note and an instrument creating a lien on real estate to secure payment thereof are related documents usually executed at the same time, and may be, and sometimes should be, construed together, for some purposes, they do not necessarily constitute one instrument in the legal sense of the terms, and they may be so interpreted as to permit each to perform its own function agreeably to the intent of the parties.—Shanabarge v. Phare et al., W. Va., 103 S. E. 349.

9.——Negotiability.—A holder for value of negotiable paper otherwise perfect has prima facie authority to complete it by filling in the name of the payee.—Grand Lodge, Knights of Pythias of Florida, v. State Bank of Florida.—Fla., 84 So. 528.

10. **Carriers of Goods**—Facilities.—Courts may inquire into the reasonableness of the requirements as to facilities and of the rates as fixed, and if found unreasonable restrain their enforcement; but they cannot go further and determine facilities and establish rates deemed reasonable, the establishment of facilities and rates being a legislative function.—Missouri, K. & T. Ry. Co. of Texas et al. v. Empire Express Co., Tex., 221 S. W. 590.

11.——Preference.—Where a carrier agreed to ship cattle within a reasonable time, the contract was not made a preferential one, in violation of 24 U. S. St. 379, 32 U. S. St. 847, regulating interstate commerce merely because the shipper requested the carrier to extend the time of confinement of the cattle without unloading for feed, water, and rest for 36 hours, as authorized by U. S. Comp. St. § 8651.—Baltimore & O. S. W. R. Co. v. Bower, Ind., 127 N. E. 458.

12.——Rest for Feeding.—Where, during rest periods in interstate transit of cattle, neither owner nor shippers exercised option to perform duty under Act Cong. June 29, 1906, to water and feed animals, carrier became obligated to perform such duty, and had lien on animals for food, care, and custody furnished, collectible at destination, whether or not it would not be liable to owner or shippers in action for negligence if injury resulted from failure to feed and water.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., Mass., 127 N. E. 509.

13. **Carriers of Passengers**—Diligence.—The degree of diligence required by law of a carrier is a matter over which it has no control and in which the public is interested.—Central of Georgia Ry. Co. v. Patterson, Ala., 74 So. 471.

14.——Insane Passenger.—In an action for personal injury sustained by insane passenger, due to jumping out of an open door in a vestibuled train, the carrier did not have a right to rely upon the insane person's attendants to keep him from jumping; the carrier's employes knowing he was insane and having promised to render assistance.—Pittman v. Hines, Director General of Rys., Ark., 221 S. W. 474.

15. **Compromise and Settlement**—Consideration.—While compromises and settlements, like other contracts, must be supported by a consideration, it is enough to support the agreement that there was a doubtful question, and, where the parties to a compromise act in good faith and one agrees to pay and the other to accept a certain sum in satisfaction of his liability upon a claim, there is sufficient consideration for the compromise.—Shrader v. McDaniel, Kan., 189 Pac. 954.

16. **Constitutional Law**—Initiative and Referendum.—The referendum provisions of state constitutions and statutes cannot be applied,

consistently with the Constitution of the United States, in the ratification or rejection of amendments to that Constitution.—State of R. I. v. Palmer, U. S. S. C., 40 Sup. Ct. 486.

17.——Ordinance.—A city ordinance, which in effect grants special permit to licensed hack drivers who can procure the consent of the abutting property owners to stand their vehicles in the street in front of such property, is not unconstitutional on the ground that it grants special privileges, although the same privilege is not granted to those who do not obtain such consent.—Mader v. City of Topeka et al., Kan., 189 Pac. 969.

18.——Taxation.—Under Const. Amend. 14, forbidding the states to deprive persons of life, liberty, or property without due process of law, a state cannot impose taxes for merely private purposes.—Green v. Frazier, U. S. S. C., 40 Sup. Ct. 499.

19. **Contracts**—Arbitration.—Where a construction contract provides that the chief engineer shall be judge and arbitrator to settle doubts, disputes, and differences arising between the parties, his decision and award thereon become final and conclusive on the parties unless successfully impeached for fraud, mistake or caprice on his part so gross as to amount to fraud on the rights of one or the other of the parties to the contract.—Vaughan Const. Co. v. Virginia Ry. Co., W. Va., 103 S. E. 293.

20.——Evidence.—Solemn written instruments, the execution of which are proved beyond peradventure, cannot be overturned by circumstances which only lead to a mere suspicion of their execution for a fraudulent purpose.—Du Fresne v. Paul, Ark., 221 S. W. 485.

21.——Oral Modification.—A written contract cannot be varied, altered, or contradicted by proof of an oral agreement on the same subject, made at the same time, and, if the oral agreement is made subsequently, there must be a consideration therefor.—Minneapolis Threshing Mach. Co. v. Francisco, Kan., 189 Pac. 981.

22. **Corporations** — Advertising Contract.—Though written contracts for advertising space were made by an agent who to deceive the buyer represented contracts might be canceled at will, knowing his promise would not be fulfilled by advertising company, company is not bound by such parol representations of the agent stipulated against in the contracts themselves.—Easter Advertising Co. v. E. L. Patch Co., Mass., 127 N. E. 516.

23.——Attorney and Client.—It is not illegal for an attorney to procure disinterested persons to sign a certificate of incorporation with the understanding that, when the charter is granted, the subscription is to be assigned to the real owners.—Schmitt v. Kulamer, Pa., 110 Atl. 169.

24.——Certificate of Stock.—A transferee of certificates of stock is prima facie presumed to be a bona fide holder, and it is incumbent upon a corporate creditor seeking to hold such transferee for any balance actually unpaid upon the face or par value of his stock to allege that the latter was not a holder in good faith without notice of the unpaid balance due upon said stock.—Smoot v. Larsen, Idaho, 189 Pac. 1105.

25.——Forfeiture.—The effect of a forfeiture of the charter of a corporation, whether from non-payment of its corporation license tax or for other cause, is to terminate its existence as a legal entity, and a judgment against it in a suit thereafter brought is a mere nullity; any attempted appearance for it conferring no jurisdiction.—Slayden v. O'Dea et al., Cal., 189 Pac. 1063.

26.——Insolvency.—The officers and directors of an insolvent corporation are in a sense trustees holding the property of such corporation for the benefit of all of the creditors, and they will not be allowed to dispose of such corporate property for their own benefit to the prejudice of the corporate creditors.—Ohio Finance Co. v. Mannington Window Glass Co. et al., W. Va., 103 S. E. 334.

27. **Criminal Law**—Indictment.—An indictment for causing and attempting to cause insubordination, etc., in the military and naval forces, and obstructing the recruiting and enlistment service, need not allege the existence of a state of war, as the courts take judicial notice of that fact.—Sonnenberg v. United States, U. S. C. C. A., 264 Fed. 327.

28.——Photographs of Locality.—Photographs, when properly authenticated, are often competent to give jury a view of objects which could not be otherwise accurately brought to their attention.—Young v. State, Ark., 221 S. W. 478.

29.——Plea of Not Guilty.—It was too late for defendant, after general plea of not guilty, to question validity of indictment or action of grand jury on ground that other than witnesses testifying were present when matter was heard.—Commonwealth v. Homer, Mass., 127 N. E. 517.

30.——Stenographer.—Notes of a private stenographer are inadmissible in evidence as hearsay, but where the stenographer is a witness may properly be used by him as an aid to memory.—Sneierson v. United States, U. S. C. C. A., 264 Fed. 268.

31. **Damages**—Mitigation.—A person injured by the negligence of another is only required to use such care and prudence as would be used by an ordinarily careful and prudent person in the treatment of such injuries, and is not bound to follow the specific treatment prescribed by any particular physician.—West Lumber Co. v. Kien, Texas, 221 S. W. 625.

32.——Profits.—Loss of profits to be recoverable must be capable of ascertainment with reasonable certainty, and plaintiff, in an action for breach of contract to furnish steam for its steam laundry, cannot recover for loss of profits by loss of customers, in addition to extra expense for furnishing its own steam, in the absence of evidence that the loss was solely caused by the breach.—American Steam Laundry Co. v. Riverside Printing Co., Wis., 177 N. W. 852.

33. **Dedication**—Implication.—To make out a case of dedication of private property to public use by implication, the facts relied upon to establish it must be of such character as clearly show the owner intended such dedication, and they must be clearly and fully proved.—Hicks v. City of Bluefield, W. Va., 103 S. E. 323.

34.—**Divorce**—Cruelty.—That husband was insanely jealous did not, where there was no reason therefor, excuse his cruelty in accusing wife of infidelity and threatening to tell her father thereof.—Champagne v. Duplantis, La., 84 So. 513.

35.——Domicile.—Where the husband after marital difficulties went to Nevada, attempted to establish a residence, and procured a divorce, but returned to the state of his wife's domicile as soon as it was granted, such act of the husband was fraud on the rights of his wife.—Pitel v. Pitel, N. J., 110 Atl. 116.

36.——Equal Fault.—Where the parties were equally to blame for the marital troubles that had caused separation, and the abandonment was mutual, neither were entitled to a divorce.—Manning v. Manning, Ky., 221 S. W. 522.

37. **Election of Remedies**—Master and Servant.—An employe, wrongfully discharged, may elect to treat the contract as ended or rescinded, and recover the value of his work, or he may consider it as subsisting, and recover damages for its breach, and election of the former remedy by suit on quantum meruit for value of services precludes him from pursuing contradictory remedy based on affirmation of contract.—Dalton v. American Ammonia Co., Mass., 127 N. E. 504.

38. **Embezzlement**—Burden of Proof.—Under an indictment for embezzlement, the state is not required to prove the embezzlement of the exact amount as alleged in the indictment or information.—Fulkerson v. State, Okla., 1092.

39. **Executors and Administrators.**—Implied Power.—Whenever a power is given in a will to sell property, without expressly naming a donee of the power, and the proceeds of the sale are to go to pay legacies or to be distributed, then the power by implication vests in the executor, unless a contrary intent appears.—Talbott v. Compher et al., Md., 110 Atl. 101.

40.——Settlement.—An "administrator de bonis non" is the official successor in trust of a deceased executor and entitled to recover, in a suit upon the probate bond, whatever of the estate remained in the executor's hands on the settlement of his account.—Weston v. Second Orthodox Congregational Society, N. H., 110 Atl. 137.

41. **False Imprisonment**—Arrest.—A warrant does not protect a sheriff from liability for

wrongful and unauthorized acts committed by him in connection with its execution; and where, after making an arrest, he delays for an unreasonable length of time in bringing his prisoner before the magistrate, and such delay is through his indifference to duty, or through willfulness, he will be liable in damages as for false imprisonment.—Schreiner v. Hutter et al., Neb., 177 N. W. 826.

42. **Fixtures**—Personalty.—An owner of realty may contract with another for the purchase of chattels under a conditional bill of sale providing that such chattels shall retain their character as personal property, even should they be annexed to the realty, except where the subject or mode of annexation is such as that attributes of personal property cannot be predicated of the thing in controversy, as where the property could not be removed without practically destroying it or where it or part of it is essential to support that to which it is attached. —De Bevoine et al. v. Maple Ave. Const. Co., Inc., et al., N. Y., 127 N. E. 487.

43.——Removal.—Wall beds which were placed in closets being installed on fixtures attached to the doors and floors are not themselves to be deemed as affixed to the realty, where they could be taken out without removing any of such fixtures so as to pass title as between a person who sold the same retaining title, and a subsequent purchaser of the premises without notice of such reserved title.—Southern California Hardwood & Mfg. Co. v. Borton et al., Cal., 189 Pac. 1022.

44. **Fraud**—Rescission.—On rescission of a contract for the purchase of a plow for false representation as to what it would do, expenses incurred by the buyer for labor, gasoline, and oil in testing the plow were recoverable.—Hackney Mfg. Co. v. Celum et al., Texas, 221 S. W. 577.

45. **Frauds, Statute of**—Real Estate.—The sale of a lease of real estate is within the inhibition of the statute of frauds, Ky. St. § 470, unless evidenced by a writing as provided therein. —Surbener v. Smith, Ky., 221 S. W. 560.

46.——Waiver.—Strict performance of a written contract within the statute of frauds may be waived by a parol understanding or by words and acts inconsistent with intention to require performance.—Albert Mackie & Co., Limited, v. S. S. Dale & Sons, Miss., 84 So. 453.

47. **Gifts**—Presumption.—Where the conveyance is made by a father to his son, or where the consideration is paid by the father, and the conveyance made by a third person to the son, there arises a presumption of gift which must be overcome by evidence before it can be determined that the written instrument shall not be effective according to its terms.—Prisco v. Prisco et al., N. J., 110 Atl. 111.

48. **Homestead**—Alienation.—The restrictions of the Constitution and statutes touching the alienation of a homestead are for the protection of the family, and cannot be varied or avoided by an antenuptial contract providing that in case the wife survives the husband she is to have no part in his estate. Hence so long as such surviving widow remains unmarried she may occupy the homestead, regardless of such contract.—Watson v. Watson et al., Kan., 189 Pac. 949.

49. **Homicide**—Defense.—In prosecution of automobile driver for manslaughter, the incapacity or imbecility of person killed to have foreseen the danger and avoided its consequences is no defense.—State v. Elliott, N. J., 110 Atl. 135.

50. **Insurance**—Delivery of Policy.—Generally, the actual delivery of a policy is not necessary to complete the contract; the contract being consummated on the acceptance of the application unless otherwise provided by contract. —Edwards v. Business Men's Acc. Ass'n of America, Mo., 221 S. W. 422.

51.——Forfeiture.—If the language of a forfeiture clause in an insurance policy is susceptible of two constructions, the one more favorable to the insured is to be adopted.—Bowling v. Continental Ins. Co., W. Va., 103 S. E. 285.

52.——Waiver.—Where insurance company retained premiums collected on a fire policy after knowledge that insured was not the sole owner, and did not offer to return them until it filed its amended answer a year and four months after loss, which occurred during the first year, policy provision as to ownership was waived.—Hayden et al. v. American Cent. Ins. Co. et al., Mo., 221 S. W. 437.

53. **Interest**—Accrual of.—A vendee in possession under a deed, with covenant of general warranty of title, from a perfectly solvent vendor, cannot avoid the payment of interest on the unpaid purchase money, pending litigation over the title, which terminated favorably thereto, by setting apart a sufficient fund to pay the amount of purchase money and interest then due and notifying the vendor thereof.—Rutherford v. Provident Life & Trust Co. et al., W. Va., 103 S. E. 273.

54. **Landlord and Tenant**—Common Use of Stairway.—In action for injuries to tenant from defective cellar stairway, common user by all tenants in building, in connection with admission that landlord repaired the step after accident, sufficiently shows retention of possession and control over stairway.—Dalton v. John Maguire Real Estate Co., Mo., 221 S. W. 443.

55.——Estoppel.—A tenant, while actually holding over under an express contract of rental, impliedly renewed, cannot dispute his landlord's title.—Linder v. Pope, Ga., 103 S. E. 265.

56.——Lessee.—Lessee of ground floor, who undertook to remove partition wall on ground floor and to substitute iron posts therefor was liable to lessee of upper stories for damage sustained when as a proximate result the upper floors dropped into basement though lessee of ground floor had exercised due care in making alterations or had had the work done by an independent contractor.—Independent Five and Ten Cent Stores of New York v. Heller, Ind., 127 N. E. 439.

57.——Tenancy.—Where, when the tenant entered, the landlord told him that he could try it at $75 per month, and rent was paid monthly in advance, and there was no definite agreement as to terms, such facts warrant finding that the tenancy was one from month to month and not at will.—Montalvo v. Levinston et al., N. J., 110 Atl. 128.

58. **Libel and Slander**—Pleading.—Whatever a litigant may properly plead as a cause of action or ground of defense, when relevant or material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel.—Simon v. London Guarantee & Accident Co., Neb., 177 N. W. 824.

59. **Limitation of Actions**—Installments.—Where a mortgage indebtedness was payable in installments with a provision that, in case of default for three months, the whole debt should be due at the option of the mortgagee, but such option was not exercised, limitations ran as to each installment from the time it fell due, and installments falling due within ten years preceding the commencement of the action were not barred.—Central Trust & Savings Co. v. Kirkman et al., Mo., 122 S. W. 981.

60. **Master and Servant**—Imputability.—If the owner of an automobile directs or authorizes his wife as his agent to operate the same in carrying him from their home to a railroad station and to drive the machine back, and in so returning she negligently and carelessly runs into or collides with the machine of a third person resulting in personal injury to him and damages his machine, the owner of the colliding machine is liable therefor upon the principle of respondeat superior and may be sued by the injured party without joining his wife as defendant in the action.—Beard v. Davis, W. Va., 103 S. E. 278.

61.——Obvious Danger.—If the danger be obvious and as easily known to the servant as to the master, the latter will not be liable for failing to give warning of it.—General Fire Extinguisher Co. v. Daniel et al., Ga., 103 S. E. 257.

62.——Ostensible Agency.—An automobile company held not liable, on the doctrine of ostensible agency, resting in estoppel in pais, for the negligent driving of its salesman on commission, an independent contractor, resulting in injury to his customer riding with him in his auto; for application of the doctrine to a tort the case must be characterized by such peculiar and exceptional circumstances that it is necessary to invoke an estoppel to prevent manifest

injustice.—Barton v. Studebaker Corporation of America et al., Cal., 189 Pac. 1025.

63. **Municipal Corporations**—Highways.—The obligation of a municipality to keep its public ways in a reasonably safe condition for public travel exists with respect to such persons as travel the ways in the usual and ordinary modes, and does not extend to undirected and uncontrollable travel, such as a team of horses running away in the absence of its driver. The municipality is not responsible for injury sustained by a person upon the vehicle involved in such runaway, if such injury to him results from the uncontrolled action of the team in leaving that part of the public way which is reasonably adequate and safe for travel.—Drake v. City of East Cleveland, Ohio, 127 N. E. 469.

64.——Police Power.—An ordinance of a city or by-law of a town segregating manufacturing and commercial buildings, on the one side, from homes and residences, on the other, is justified by the broad conception of the police power created by Const. Amend. 60, giving the General Court power to limit buildings, according to their use or construction, to specified districts of cities and towns.—In re Opinion of the Justices, Mass., 127 N. E. 525.

65. **Negligence** — Joint Negligence. — Where both parties are negligent, the damages save in admiralty are not shared, unless one of such parties, notwithstanding the negligence of the other, might have avoided the injury.—Legendre et ux. v. Consumers' Seltzer & Mineral Water Mfg. Co., La., 84 So. 517.

66. **Partnership**—Subrogation.—Creditors of a partnership have no lien as such on the firm property, their only right thereto being in the nature of subrogation to the rights of the partners to have the firm property applied to the payment of firm debts.—Wade et al. v. National Bank of Commerce in St. Louis, Mo., 221 S. W. 365.

67. **Pledges**—Preservation of.—The pledgee of property has the control of it for the time being, and he represents not only his own interests, but that of the pledgor, in taking any proper action for the preservation of it and the collection and care of its proceeds.—Navajo Live Stock & Trading Co. v. Gallup State Bank, N. Mex., 189 Pac. 1108.

68. **Principal and Surety**—Bank Employe.—The surety of a bank employe, which had executed a bond for an increased amount when the employe was made cashier, is not liable above the amount of the original bond for embezzlements by employe before he became cashier, though thereafter he concealed the embezzlement by forging notes and placing them with genuine notes of the bank.—First Nat. Bank of Easton v. Aetna Casualty & Surety Co., Pa., 110 Atl. 165.

69. **Principal and Agent**—Fidelity.—In the conduct of his principal's business an agent is held to the utmost good faith, and will not be allowed to use his principal's property for his own advantage, or to derive secret profits or advantages to himself by reason of the relation of principal and agent existing between him and his principal.—Sutherland et al. v. Guthrie, W. Va., 103 S. E. 298.

70.——Proof of Agency.—Agency cannot be established by proof of hearsay declarations as to agency made by an agent.—Rosenbluth v. Hudson Motor Car Co. et al., U. S. D. C., 264 Fed. 353.

71. **Religious Societies**—Principal and Agent.—The congregation composing a religious society may appoint a committee or committees for the purpose of performing any act which it may lawfully perform, and the act of such committee, or committees, within the scope of the authority conferred, will be binding upon such congregation or association.—Potts et al. v. Longest & Tessler Co. et al., W. Va., 279.

72. **Sales**—Acceptance of Order.—Seller's notice to buyer that order had been received and would receive seller's attention held not an acceptance of the order, so as to preclude buyer from thereafter canceling order.—Krohn-Fechheimer Co. v. Palmer et al., Mo., 221 S. W. 353.

73.——Conditional Sale.—A conditional bill of sale executed by a corporation without seal may be acknowledged and recorded.—Turner & Seymour Mfg. Co., v. Acme Mfg. Co., N. J., 110 Atl. 123.

74.——Offer and Acceptance.—One who accepts an offer for the sale of goods, which from the circumstances surrounding the parties at the time, or from the gross inadequacy of the price quoted he must know is made under a misapprehension of some material fact, and which offer is repudiated by the party making the same as soon as such mistake is discovered, will not be entitled to recover damages in case of the failure of the party making the offer to furnish the goods in accordance therewith.—Hardman Lumber Co. v. Keystone Mfg. Co., W. Va., 103 S. E. 282.

75. **Statutes**—Repeal.—When a later statute is enacted, inconsistent with a preceding statute, and covering the entire ground of the subject-matter, it supersedes and impliedly repeals the preceding, especially when the later statute imposes penalties of less severity.—United States v. Windham, U. S. D. C., 264 Fed. 376.

76. **Torts**—Joint Tortfeasors.—Joint tortfeasors are liable in solido, and party injured may sue one or both, who cannot resist on ground injured party's action against other has been compromised, so long as full compensation has not been paid.—Johnson v. Legeal, La., 84 So. 505.

77. **Trade-marks and Trade-names**—Unfair Competition.—Where defendant, both in its advertising and in the marking of its truck trailers, claimed them as its own product, similarity in appearance to plaintiff's trailer, though due to copy, is not unfair competition.—Troy Wagon Works Co. v. Ohio Trailer Co., U. S. D. C., 264 Fed. 347.

78. **Trusts**—Trustee.—The interest of one who acts in a fiduciary capacity should not be in conflict with the interest of the person whom he represents.—Missouri Valley Trust Co. v. Nelson, Neb., 177 N. W. 835.

79. **Vendor and Purchaser**—Notice.—One who purchases land, with knowledge that others are in possession of a portion of it under an agreement of the nature of a mining lease, takes it subject to the rights of the lessees.—Clay et al. v. Palmer et al., Neb., 177 N. W. 840.

80. **Waters and Water Courses**—Beneficial Purpose.—There can be no valid appropriation of water unless the water is subject to appropriation, and is not only diverted, but also applied to useful purpose, and no appropriation is valid in excess of what is reasonably necessary for the useful purpose in view.—Allen v. Magill, Ore., 189 Pac. 986.

81. **Wills**—Aliunde Evidence.—Where a will directed the executors to convert testator's residuary estate into money and pay it over to a designated trustee "to be held, managed, and disposed of as a part of the principal of the estate and property held by it in trust for my life and the lives of others in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust and property," extrinsic evidence held admissible to identify the trust, and thus to determine the meaning of the provision.—Atwood et al. v. Rhode Island Hospital Trust Co. et al., U. S. D. C. 264, Fed. 360.

82.——Interest.—Interest is due on legacies, not as a penalty for non-payment on demand, or a default in payment, but as a part of, or incident to, the legacy itself.—In re Paynes Will, Wis., 177 N. W. 858.

83.——Trust Fund.—The property and benefits relinquished by a widow in the exercise of her legal right to renounce the provision made for her in lieu of dower, by her husband's will, constitute a trust fund for compensation of legatees and devisees, for the losses inflicted upon them by the exercise of such right.—Page v. Rouss et al., W. Va., 103 S. E. 289.

84. **Witnesses**—Refreshing Memory.—A map, diagram, or picture, whether made by the hand of man or by photograph, identified as a correct representation of physical objects, about which testimony is offered, is admissible in evidence for the use of witnesses in explaining their evidence and to enable the jury to better understand the testimony.—Landrum et al. v. State, Fla., 84 So. 538.

85.——Surprise.—Where a party is surprised at testimony of his own witness by his unexpectedly turning hostile, he may exercise the right of cross-examination of the witness or impeach his testimony by other witnesses, to prevent a failure of justice.—Commonwealth v. Reeves, Pa., 110 Atl. 158.